United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

ORIGINAL WITH AFFIDAVIT OF MAILING

75-1073

To be argued by
STEVEN KIMELMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1073

UNITED STATES OF AMERICA,

Appellee,

—against—

EDUARDO BERMUDEZ, JORGE VIVAS and ISRAEL DIAZ-MARTINEZ,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

Eduardo Bermudez, Jorge Vivas and Israel Diaz-Martinez appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Mishler, *C.J.*) entered on February 7, 1975. Appellants were convicted, after a jury trial of conspiracy to distribute cocaine in violation of Title 21, United States Code, Section 846.* Appellants were each sentenced to 5 years

* Appellants Bermudez and Vivas were also indicted but acquitted on one substantive count of possession with intent to distribute cocaine. Three co-defendants named in all six counts of the indictment, Manuel Fiffe, Victor Blanco and Luis Miranda pleaded guilty to one count of conspiracy in violation of Title 21, United States Code, Section 846(a)(1) prior to the commencement of appellants' trial. Fiffe and Miranda subsequently testified for the government at the trial. On May 16, 1975, the defendants Fiffe and Blanco were sentenced to three years imprisonment and a special parole term of three years. Miranda is still awaiting sentence.

imprisonment and special parole term of 10 years. All three appellants are currently free on bail pending the outcome of this appeal.

On this appeal, appellant Diaz-Martinez raises three issues. First, appellant Diaz-Martinez alleges that the trial court erred by its failure to give limiting instructions concerning appellant's cross-examination on evidence previously suppressed on the government's direct case. Second, appellant argues that Chief Judge Mishler's charge on accomplice testimony was insufficient. Finally, appellant also claims that the district court erred in denying his motion for a new trial. Appellants Bermudez and Vivas raise a total of fourteen additional claims of error. These include: (1) the failure of the indictment to charge an overt act as part of the conspiracy (2) the alleged improper cross-examination of appellant Bermudez's character witnesses; (3) the admission of circumstantial evidence against appellant Vivas; (4) the qualification of a DEA undercover agent as an expert witness; (5) the district court's mid-trial charge on conspiracy; (6) a claim that the trial court coerced a verdict; and (7) the failure of the United States to call co-defendant Victor Blanco as a witness. Seven additional points are raised by appellants Bermudez and Vivas which require only summary discussion.

Statement of the Case

A. The Case-in-Chief

In October, 1973, appellant *Diaz-Martinez,* the owner of a clothing store located at 293 Grand Street, Brooklyn, New York informed his employees co-defendants *Manuel Fiffe* and *Luis Miranda* that they were going to help him sell cocaine (679, 899-900).[1] Fiffe began to sell cocaine for appellant Diaz-Martinez at the clothing store. He would take orders for cocaine which Miranda would then deliver (905). Both Fiffe and Miranda obtained the cocaine from Diaz-Martinez and gave him all the receipts of sales (680-681, 905-908). A third employee of the clothing store, one Juanita Guzman, also known as Juanita Diaz, also participated in appellant Diaz-Martinez's cocaine business. Guzman was the girlfriend of appellant Diaz-Martinez and he had set her up in an apartment located at 239 South 4th Street, Brooklyn, New York (684, 900-901). This apartment was used to prepare and store the cocaine for eventual sale (902-904). Cocaine was also kept at the clothing store on Grand Street (904).

On November 5, 1973, Fiffe picked up one ounce of cocaine from appellant Diaz-Martinez and brought it to the apartment of another co-defendant Victor Blanco (688). At Blanco's apartment he met Special Agent Barry Abbott of the Drug Enforcement Administration, who was acting in an undercover capacity (226-227, 689). With Victor Blanco acting as a Spanish-English interpreter, Agent Abbott purchased the one (1) ounce of cocaine from Fiffe for $675.00 (237-238). Fiffe returned to the clothing store and gave this money to appellant Diaz-Martinez.

On November 8, 1973, Fiffe obtained a sample of cocaine from appellant Diaz-Martinez (693). Agent Abbott met with Fiffe and Blanco that day at the clothing store and was given the sample (244, 692-695). He tentatively

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[1] Page references in parenthesis refer to pages in the transcript of trial. "App. refers to the Government's Appendix, "Supp. App." refers to appellant Diaz-Martinez's supplemented appendix.

agreed to purchase an eighth (⅛) kilo of this new cocaine for a price of $2900.00 (255-256).

On November 11, 1973, Fiffe learned from Blanco that Agent Abbott wanted to purchase the eighth (⅛) kilo the next day (696-697). Fiffe thereupon made arrangements with appellant Diaz-Martinez who told him the cocaine would be available at the store the next day at 4:00 P.M. (697).

On the afternoon of November 12, 1973, Fiffe was told by appellant Diaz-Martinez to send Luis Miranda to Juanita Guzman's apartment on South Fourth Street (697-698). Agent Abbott and Blanco arrived at the store before Miranda returned with the cocaine and, therefore Fiffe called Juanita Guzman to find out what happened (698-699).[2] Juanita informed him that Miranda had picked up the package and was on his way to the store (699). While Abbott and Blanco went out for coffee, Miranda arrived at the store with the cocaine (912-914). When Abbott returned to the clothing store, he followed Fiffe through a trap door in the back of the store into the store's basement (277-278). Once in the basement, the sale for the eighth (⅛) kilogram was consumated for $2,900 (281-286).[3] Fiffe later delivered the $2,900 to appellant Diaz-Martinez (702).

On November 19, 1973, Victor Blanco informed Fiffe that Agent Abbott was interested in a half kilogram purchase (702). Fiffe approached appellant Diaz-Martinez but appellant apparently did not have that much cocaine presently available for sale (708-709). Fiffe, therefore, approached appellant Bermudez, a regular customer of the store whom he observed snorting cocaine with Diaz-Martinez on several prior occasions (710). Fiffe informed appellant Bermudez that a cocaine customer of appellant Diaz-Mar-

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[2] Agent Abbott observed Fiffe make this call and was able to remember the number later confirmed to be Juanita's (271, 953-954).

[3] Agent Abbott tried to obtain a reduction in the $2,900 price but he was informed by Blanco that Fiffe was only a "front man" (281).

tinez needed a half kilo of cocaine which Diaz could not supply (711). Bermudez met with Fiffe and Blanco at Blanco's apartment on the evening of November 19, 1973 to discuss the sale and then Bermudez took Fiffe to the record store owned by appellant Vivas on Gates Avenue in Brooklyn (719-723).[4]

On November 20, 1973, Agent Abbott again received a phone call from Blanco informing him that additional cocaine was available for sale (290-291). Later that afternoon, Agent Abbott met with Fiffe and Blanco at Blanco's apartment (291). Fiffe called Bermudez's house and was informed that he was already at the record shop (723-724, 727).[5] Fiffe then told Agent Abbott that the deal would occur at a nearby business and they all left to the record shop (297-298).

At the record shop, Fiffe, Blanco and Abbott went into the back room where they saw appellants Bermudez and Vivas and a third unidentified individual (300-301, 726-727). Blanco informed Agent Abbott that Bermudez was the "boss" (302). After a delay, appellant Vivas finally produced what was said to be ½ kilo of cocaine (339-341, 729-730). Abbott asked Bermudez who would do the negotiating and appellant Bermudez pointed to appellant Vivas (341). The transaction was not completed because Agent Abbott did not have enough money to purchase the entire ½ kilo and Vivas refused to sell less than the entire amount (344-346).

On November 29, 1973, Agent Abbott again met with Blanco at his apartment (369-370). Present at this meet-

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[4] It had been decided by Blanco and Bermudez to conclude the ½ kilo sale at the record shop (720-721).

[5] Agent Abbott was able to observe Bermudez's telephone number on a business card used by Fiffe to make the call (296-297, 960-961).

ing was Juanita Guzman also known as "Juanita Diaz" who told Abbott that her "husband" was the boss of the clothing store" (373). She also informed Abbott that she would attempt to contact appellant Bermudez for him but, if Abbott wanted to continue to deal in smaller amounts, he could obtain them at clothing store owned by appellant Diaz-Martinez (379-380). (A search of the clothing store, pursuant to a warrant, which was conducted on March 27, 1974, turned up narcotics parapharnalia, but no drugs).

On May 30, 1974, a sealed indictment was returned charging the three appellants here (Eduardo Bermudez, Jorge Vivas and Israel Diaz-Martinez) along with Manuel Fiffe, Victor Blanco and Louis Felipe Miranda. Subsequently, on June 14, 1974 a search, pursuant to a warrant, was made of appellant Vivas' house (994). As a result of this search, traces of cocaine as well as various implements of a cocaine business were found, e.g. bags of lactose and a scale (996-1015).

After the defendants were arraigned and prior to trial, the defendants Fiffe, Miranda and Blanco agreed to plead guilty and testify at trial. Ultimately only the defendant Fiffe testified at trial; along with the testimony of the D.E.A. undercover agent, Barry Abbott, they were the principal witnesses at the trial.

B. The Defense Case

1. Appellant Bermudez

Appellant Bermudez testified that as a customer of the clothing store at 293 Grand Street, he knew Manuel Fiffe, but that he had never met appellant Diaz-Martinez (1123-1126). He also admitted going to appellant Vivas' record store on the evening of November 20, 1973 (1126). He stated however, that he went there to buy records, (1127) and denied participating in any cocaine transaction (1127-1132,

1137). Appellant further testified that he saw Abbott, Blanco, Fiffe in the back room of the store but he denied speaking to them (1130-1131, 1225).

On cross-examination, Bermudez claimed that he had not met with appellant Vivas prior to November 20, 1973 or at any time since and that moreover, he had never been to Vivas' house on Belmont Avenue in Brooklyn (1221-1222).[6] He also admitted that Vivas was in the store on November 20, 1973 but denied that Vivas had gone into the back room (1220-1221). Bermudez further admitted making several trips to Columbia between November 1973 and May 1974 (1226-1227).

Two character witnesses also testified for appellant Bermudez. Each was asked whether they had heard appellant Bermudez was arrested both in New Orleans on June 7, 1974 on a marijuana charge and for the charges for which he was now on trial (1197, 1199, 1205-1206). Both character witnesses denied hearing of either arrest (1197, 1199, 1205-1206).

2. Appellant Jorge Vivas

Appellant Vivas rested without putting in any defense.

3. Appellant Israel Diaz-Martinez

Appellant Martinez called two witnesses and testified himself.

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[6] The United States introduced two business cards taken from appellant Bermudez at the time of his arrest. One card was from the record shop and the other card had the name Jorge (Vivas) and the number of the record shop. Bermudez admitted the cards belonged to him (1218-1219, 1273-1276).

(a) Francisco Rivera

This witness was an employee of appellant Diaz-Martinez who testified essentially that during the time of the conspiracy co-defendant Miranda (not Diaz-Martinez) attempted to sell him cocaine and told him at the same time not to sell appellant Diaz-Martinez about it (1282, 1299).

(b) Helen Berrios

She testified that both Fiffe and Miranda called her from jail (1316, 1317). Berrios stated that during these phone conversations, both men threatened to falsely implicate Diaz-Martinez if he didn't get them out of jail (1316-1317).

(c) Israel Diaz-Martinez

Appellant Diaz-Martinez testified that he was in fact the owner of the clothing store located at 293 Grand Street, Brooklyn and that he had employed Fiffe, Miranda, and Juanita Guzman (1326, 1329, 1332-1333, 1335). He denied knowing either Bermudez or Vivas (1341, 1437). Appellant also confirmed Helen Berrio's testimony and stated that he himself had received several threatening calls himself from both Fiffe and Miranda (1343-1346). The last question put to appellant on direct examination was as follows: "Did you ever in your life ever handle or deal with or sell cocaine or any other drug?" (1348). Appellant replied he had not (1348).

On cross-examination, appellant admitted that Juanita Guzman was his girlfriend and that he had given her money as well as paid for the telephone at 239 South Fourth Street (1375, 1379). He also conceded that the trap door to the basement of the store was built after he bought it but insisted that he did not know who built it (1392, 1397).[7]

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[7] Appellant claimed that he never used the trap door but that he personally used the street entrance to the basement (1395).

Moreover, although the district court had suppressed evidence, including narcotic paraphernalia which had been found during a search of the basement of appellant's store, the Assistant United States Attorney was permitted to show that the existence of this evidence impeached the testimony of Diaz-Martinez that he had never dealt or handled cocaine or any other drug. Appellant Diaz-Martinez, however, denied any knowledge of the narcotics paraphernalia found in the basement of the store (1401-1402, 1420-1421).[8]

C. The Rebuttal Case

The United States presented two rebuttal witnesses. The first, George Feeney, a Special Agent of the Drug Enforcement Administration, testified that on the evening of March 20, 1974 he observed appellant Bermudez enter the home of appellant Vivas located at Belmont Avenue in Brooklyn (1439, 1446-1447). This contradicted Bermudez's testimony that he had never been to Vivas' house.[9]

Saul Rodriguez, a New York City police detective testified that on January 17, 1974, while acting in an undercover capacity, he had conversation with appellant Diaz-Martinez relative to the purchase of half (½) kilo of cocaine (1501-1504). According to Rodriguez, appellant Diaz-Martinez told him no cocaine was presently available but that appellant expected some within the next few days (1533). On surrebuttal, appellants Bermudez and Diaz-Martinez specifically denied the allegations made by Special Agent Feeney and Detective Rodriguez respectively (1535, 1543-1544).

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[8] A stipulation was entered as to these items.

[9] On cross-examination, appellant Bermudez had specifically denied ever going to the Vivas house (1221-1222).

D. The Suppression Hearing

On March 27, 1974 Drug Enforcement Administration agents searched appellant Diaz-Martinez's clothing store at 293 Grand Street pursuant to a search warrant Appellant moved to suppress the narcotics paraphernalia seized by the agents in the store's basement. Appellant claimed among other grounds, that the face of warrant which described the premises to be searched as "293 Clothing Corporation 293 Grand Street" was unconstitutionally broad because there were two floors of apartments above the clothing store. The United States argued that the search came only after three months of investigation into the activities of the clothing store and therefore the agents who executed the warrant knew that the description 293 Clothing Corporation referred only to the clothing store and not the apartments above which had a separate locked entrance. In addition, the affidavit in support of the warrant contained a detailed description of the premises known as 293 Clothing Corp. 293 Grand Street Clothing Store and its basement (A. 1a-4a).

An evidentiary hearing was held on October 17 and 18, 1974. At the suppression hearing, the United States called two Drug Enforcement Administration agents who had executed the warrant. One of these agents had also helped prepare the affidavit in support of the warrant.

Special Agent Alexander Dovedko was the Drug Enforcement Administration agent in charge of the five month investigation in the clothing store at 293 Grand Street. He testified that he personally visited the premises on one-half dozen occasions between November 1973 and March 27, 1974 (606). He also stated that he spoke with Special Agent Abbott relative to his purchase at the store (606-607).

Dovedko emphasized that there had been no investigation of the apartments above the store and that during the execution of the search warrant no attempt was made to search these apartments (607, 613, 627).

Special Agent Edward Magno of the Drug Enforcement Administration also testified. He stated that he helped Special Agent Michael Campbell prepare the affidavit in support of the warrant in question (637). He added that most of the agents involved had visited the premises at 293 Grand Street, the night before the search that there had been a meeting of all the agents just prior to the execution of the warrant (645). Magno also corroborated Dovedko's statements that no attempt had been made to search the apartments above the store (646). Finally, Magno testified that Agent Campbell and he had learned from the telephone company that the clothing store was known as the 293 Clothing Corporation (649).[10]

Both Dovedko and Magno testified that they believed that the caption on the warrant was for the clothing store and its basement. There was no evidence offered, however, to show whether the affidavit, which more fully described the premises to be searched, accompanied the warrant.[11]

Chief Judge Mishler ruled that the description 293 Clothing Corporation 293 Grand Street could have permitted a search of the entire building and therefore the seized evidence should be suppressed.

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[10] When appellant Diaz testified at the trial, he confirmed that the 293 Clothing Corporation of which he was the president owned the store but not the apartments above it (366).

[11] Special Agent Campbell who made the return on the warrant was unavailable to testify at the time of the suppression hearing.

E. The Post-Trial Hearing

Following the judgment of conviction, appellant Diaz-Martinez moved on May 16, 1975 for a new trial based on the alleged failure of the United States to turn over both Brady and Jenks Act material. Appellant alleged in his motion that the federal and state narcotics agents had conducted a joint investigation of his activities during the course of the conspiracy charged in the federal indictment, and that the United States failed to turn over all the Jenks Act material of Detective Rodriguez, who testified on rebuttal (A. 11a). Appellant Diaz-Martinez claimed in his motion that he was entitled to any and all material concerning the state investigation in 293 Grand Street even though none of this material was ever in the possession of the United States (A. 10a-14a).

A post trial hearing on these allegations was held on May 30, 1975 by Chief Judge Mishler. Appellant called both Detective Rodriguez and Special Agent Abbott as his witnesses. Detective Rodriguez testified that the only state report concerning activities at 293 Grand Street that was ever turned to federal authorities was Rodriguez's report of the January 17, 1974 meeting with appellant Diaz-Martinez (Supp. App. 60).[12] Rodriguez reaffirmed his trial testimony that he had written no other reports relative to appellant Diaz-Martinez (Supp. App. 61-62). The detective also confirmed that there was an entirely separate federal and state investigation of the individuals connected with 293 Grand Street. He confirmed that, while there had been some cooperation between the authorities, no investigation reports had ever changed hands (Supp. App. 22-24). During his testimony, Rodriguez turned over the entire state investigation file over to Chief Judge Mishler to examine *in camera*. After examining this file, Chief Judge Mishler concluded it contained no Brady material or any information that should have been turned over pur-

[12] This report was turned over during appellant's trial (1505).

suant to T. 18, U.S.C. § 3500 *even* if it *had been* in the Government's possession prior to or at the time of the trial (51).[13]

ARGUMENT

POINT I

The failure of the trial court to *sua sponte* instruct the jury as to evidence offered under *Harris v. New York* was not error.

Appellant Diaz-Martinez argues that the district court failed to instruct the jury that the evidence of narcotics paraphernalia found in his store, which had been suppressed on the direct case but was used to impeach his credibility on cross-examination, was to be considered solely for that limited purpose. Although no request for a limiting instruction had been made, appellant now claims that the district court erred in not telling the jury that they could not consider this evidence to determine whether the defendant had committed the crimes here charged. This claim is without merit for a number of reasons.

First, since no request to charge was made at trial, the issue may not be raised at this point. F.R. Crim. P., Rule 30. *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1966); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966). Indeed, if the failure to make a timely objection is deemed to waive a claim that illegally seized evidence was improperly admitted on the direct case *United States* v. *Mauro*, 507 F.2d 802 (2d Cir. 1974), the failure to request a limiting instruction of the kind here, which is necessary only because the evi-

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[13] Special Agent Abbott testified that there had been in fact no joint federal—state investigation of 293 Grand Street and that no state files had ever been turned over to federal authorities (Supp. App. 78-79).

dence was illegally seized, should likewise be deemed to waive the objection.

Second, if error was committed in failing to give the instruction which appellant now claims should have been given, that error was plainly harmless. The evidence of the narcotics paraphernalia represented only a small part of the proof of appellant's participation in the conspiracy. Not only did two accomplices testify extensively, but on rebuttal an undercover police officer stated he had dealt directly with appellant (1501-1504). Even if it might have been the better practice for Chief Judge Mishler to have *sua sponte* given a limiting instruction, surely the failure to do so upon the record in this case is harmless error.

Third, we submit that the district court erred in suppressing the evidence altogether. We have previously described in detail the manner in which the search was conducted (see, *supra*, pp. 10-11). Briefly, on March 27, 1974,[14] Drug Enforcement Administration Agents executed a search warrant on the clothing store owned and operated by the appellant Diaz-Martinez (A. 5a-7a). Although no narcotics were found, a number of items used in the narcotic trade were seized (A. 7a). Upon appellant Diaz-Martinez's motion, Chief Judge Mishler suppressed these items on the grounds that the description of the premises to be searched as set forth on the face of the warrant was unconstitutionally broad (659-660). He found that the description "premises known as 293 Clothing Corporation 293 Grand Street" did not sufficiently describe the clothing store and its basement because of the existence of two floors of apartments above the clothing store.[15] Chief Judge Mishler did find, however, that the agents executing the warrant knew that the description "293 Clothing Corpora-

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[14] The duration of conspiracy charged in the indictment was from October 31, 1973 to May 1, 1974.

[15] The apartments had their own separate entrance (656-657).

tion, 293 Grand Street" referred only to the clothing store and its basement and not the apartments above (659). Moreover, only that area was searched.

The standard for determining whether the warrant adequately describes the place to be searched is set forth in *Steele* v. *United States,* 267 U.S. 498, 503 (1925):

> "It is enough if the description is such that the officers with a search warrant can, with reasonable effort ascertain and identify the place intended."

We believe that the standard set out in *Steele* v. *United States* was met here. The warrant described the place to be searched as "the premises known as "293 Clothing Corporation, 293 Grand Street"; the mere fact that there were two apartments above the premises occupied by the 293 Clothing Corporation, at 293 Grand Street, hardly renders the description unconstitutionally broad. *United States* v. *Ramos,* 282 F. Supp. 354, 355 (S.D.N.Y. 1968); *United States* v. *Gomez,* 42 F.R.D. 347, 348, (S.D.N.Y. 1967); *United States* v. *Pisano,* 191 F. Supp. 861, 863 (S.D.N.Y. 1961). In any event, under all the circumstances here, even if the warrant was technically deficient, the exclusionary rule should not be applied. As the Supreme Court observed in *Michigan* v. *Tucker,* 417 U.S. 433, 446 (1974):

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose."

Here the application of the exclusionary rule will serve no significant deterrent purpose. For here the law enforcement procured a warrant and there was concededly prob-

able cause. To the extent that the description was vague it was plainly inadvertent and the law enforcement officers executing the warrant did not, in fact, search any area other than that occupied by the 293 Clothing Corporation. The application of the exclusionary rule, under these circumstances, would seem pointless. *Cf. United States* v. *Burke*, — F.2d — (2d Cir. decided May 15, 1975).[15a]

POINT II

The trial court correctly denied appellant Diaz-Martinez's motion for a new trial.

Appellant Diaz-Martinez moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds of new discovered evidence (A. 10a-14a). Appellant's counsel claimed in his moving papers that he had "discovered" after the trial in the instant case, that a Government witness, New York City Police Detective Saul Rodriguez, had testified in a State trial (Supreme Court—Kings County) against appellant's co-defendants Manuel Fiffe and Victor Blanco. According to appellant's counsel, the transcript of Rodriguez's state court testimony "revealed" that (1) federal and state narcotics agents conducted a "joint investigation of the narcotics activities . . . centering around the clothing store at 293 Grand Street in Kings County", and (2) the Government had failed to turn over or even disclose the existence of extensive New York City Police reports relating the State's investigation of the individuals connected with 293 Grand Street. Appellant further claims that this material should have been turned over by the Government pursuant to both 18 U.S.C. § 3500 and *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). If such material had been available to him, appellant's counsel concludes in his motion, he would then been able to more

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[15a] We add, also, that appellant Diaz-Martinez' standing to challenge the search of the corporate offices, even as a target is at best open to question. See *United States* v. *Mapp*, 476 F.2d 67, 71 (2d Cir. 1973).

effectively examine the Government's "star witness" Manuel Fiffe.

Appellant's claims disintegrate in the face of the uncontradicted testimony elicited at the May 30, 1975 post-trial hearing on appellant's motion. Both witnesses called by appellant (Barry Abbott, the Federal "case agent" and Saul Rodriguez, the New York City detective) clearly stated that no "joint investigation" of appellant or any of his co-defendants was conducted by Federal and State authorities during the term of the conspiracy charged in the federal indictment (Supp. App. 22-24). Moreover, Rodriguez repeated his trial testimony that he had completed only one report on appellant Diaz-Martinez during his entire undercover investigation.[16] In support of this testimony, Rodriguez produced the entire New York City police file on this investigation which was examined by Chief Judge Mishler *in camera* during the hearing.[17] Upon the completion of the hearing, the district court ruled from the bench that the Government had not "inadverently or intentional (sic) withheld any information in any form that could have been used by the defendant for more effective cross-examination" (Supp. App. 92).

The standards applicable to motions for a new trial were resently set forth in *United States* v. *Slutsky,* 514 F.2d 1222 (2d Cir. 1975):

> "Motion for new trials based on newly discovered evidence 'are not held in great favor', *United States* v. *Catalano,* 491 F.2d 268, 278 (2d Cir.), *cert. denied,* 95 S.Ct. 42 (1974). To succeed on such a motion a defendant must show, *inter alia,* (1) that the evi-

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[16] This report has been turned over to appellant pursuant to Section 3500 (1505).

[17] After examining the file *in camera,* Chief Judge Mishler concluded that there was nothing in the file that should be turned over (Supp. App. 51).

> dence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict. *United States* v. *Costello*, 255 F.2d 876, 819 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958) *citing*, *Berry* v. *State*, 10 Ga. 511, 527 (1851)"

Appellant's motion plainly fails to satisfy the criteria set forth in *Slutsky supra*.

Appellant's trial counsel indicated both at the trial (before he cross-examined Fiffe) and at the post-trial hearing that he knew co-defendant Fiffe, Blanco and Miranda had been indicted for sale of cocaine by State authorities in Kings County and were awaiting trial (734-738, Supp. App. 88-89). He was aware of these indictments because he represented unindicted co-conspirator Juanita Guzman, a/k/a "Diaz" who had been named in one of the pending State cases as Fiffe's co-defendant (Supp. App. 88-89). Knowing therefore that Fiffe, Miranda, Blanco and Guzman had been indicted for dealing with State narcotics officers during the same period of time charged in the instant indictment, appellant's counsel was in a position to subpoena whatever State documents he felt might have assisted him in cross-examining the Government's witnesses. Moreover, as we have noted, Chief Judge Mishler specifically found that the additional material in the police file would have been of no benefit to appellant. *United States ex rel. Regina* v. *Lavalle*, 504 F.2d 580, 584 (2d Cir. 1974), *cert. denied*, 95 S.Ct. 1330 (1975). Such a finding by the trial court, who has had the opportunity to observe each of the witnesses first hand, should not be disturbed unless clearly erroneous. *United States* v. *Zane* 507 F.2d 346 (2d Cir. 1974), *cert denied*, — U.S. — (1975).[18]

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[18] Appellant's related claim that the entire police file should have been turned over by the United States pursuant to Section

[Footnote continued on following page]

POINT III

The district court's charge on accomplice testimony was fully and fairly presented to the jury.

Appellant Diaz-Martinez challenges the district court's charge to the jury on the weight to be given to the accomplice testimony. This claim is frivolous. Chief Judge Mishler instructed the jury as follows (Appellant Diaz-Martinez's Appendix 1732-1733):

> The testimony of an alleged accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated, or supported by other evidence.
>
> Now, whether or not their testimony is corroborated or supported by other evidence is a question for you to decide. But I am Charging that even if Fiffe's and Miranda's testimony as alleged accomplices is not corroborated or supported by other evidence, their testimony alone is enough to support a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. Their testimony is not to be considered by you as you might consider any ordinary layman's testimony. You must recognize that they say they participated in the crime charged. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe such unsupported testimony to be true beyond a reasonable doubt.

[Footnote continued from prior page]
3500 is frivolous. The uncontradicted testimony of the hearing witnesses and the unsworn representations of the Assistant United States Attorney at the hearing (87) indicate that the local police file was never in the possession of either the Drug Enforcement Administration or the United States Attorney's Office. Section 3500(b) provides only that statements of a witness "in the possession of the United States" must be turned over to the defendant after the witness has testified.

This charge is plainly sufficient. *United States* v. *Corallo*, 413 F.2d 1306, 1323 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States* v. *Famulari*, 447 F.2d 1377, 1382 (2d Cir. 1971). See, also, *United States* v. *Santana*, 503 F.2d 710, 716 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974).[19]

POINT IV

Count One of the indictment is sufficient.

There is no support for appellants Bermudez and Vivas' contention that an indictment for conspiracy under 21 U.S.C. § 846 must allege an overt act.[20] A similar claim was rejected in *United States* v. *DeViteri*, 350 F. Supp. 550 (E.D.N.Y. 1972). There the district court denied defendant's motion to dismiss the indictment for failure to allege an overt act, stating that a conspiracy count under 21 U.S.C. § 846 is no different than a conspiracy count under the old 21 U.S.C. §§ 174 and 176(a), which did not require allegations of an overt act. *See also*, *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Cal. 1962). Moreover, "there is authority to the effect that proof of an overt act is *not* [even] a necessary element of conspiracy under 21

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[19] *United States* v. *Padgent*, 432 F.2d 701 (2d Cir. 1970), cited by appellant, did not involve the adequacy of the charge on accomplice testimony. The language regarding accomplice testimony, quoted by appellant (Br. 28), was made in the context of a case dealing with the curtailment of cross-examination relating to the motive of such a witness to testify; it did not alter the traditional charge on accomplice testimony. Here appellant's cross-examination of the accomplice on this point was in no way hampered by the court (925).

[20] Appellants' reliance on *United States* v. *Torres*, 503 F.2d 1120 (2d Cir. 1974) is misplaced. In *Torres* sufficiency of the indictment was not in issue. An overt act had been alleged and appellant claimed that knowledge of a broader conspiracy could not be inferred from that single act. The court disagreed and upheld the conviction for conspiracy to distribute heroin under 21 U.S.C. § 846.

U.S.C. § 846". *United States* v. *Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975). These cases reasoned that a conspiracy to violate former Sections 174 and 176(a) was a specific crime in and of itself which did not require an allegation of overt acts in the indictment. There does not appear to have been any intention or attempt on the part of Congress to change the previous law relating to narcotics conspiracies contained in Sections 174 and 176(a).

POINT V

The cross-examination of appellant Bermudez's character witnesses was proper.

Bermudez presented two character witnesses who vouched for defendant's reputation in the community as a law-abiding citizen. Before cross-examination began, the Assistant United States Attorney informed the court (out of the jury's presence) that a question would be asked concerning defendant's arrest in New Orleans on June 7, 1974 on a marijuana charge (1167). Chief Judge Mishler received documentary proof of the arrest (1177) and ruled that such a question would be proper.[21] Appellant alleges: (1) that the question should not have been allowed under any circumstances; and (2) that the trial court allegedly confused the jury by its instruction limiting the use of the question. Appellant's argument is without substance or merit.

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[21] Appellant's claim that the district court accepted "bare, unsworn representations" of Bermudez' arrest is simply untrue. The Assistant United States Attorney produced a record from the District Attorney in New Orleans showing that Bermudez had been arrested on June 7, 1974 on charges involving possession or conspiracy to possess 4½ tons of marijuana (1176). The judge accepted this record as proof of the arrest and as an assurance that the question would be asked in good faith (1177).

The Supreme Court held in *United States* v. *Michelson*, 335 U.S. 469 (1948) that a witness who testified to the good reputation of the defendant for a particular trait, may be cross-examined as to his knowledge of community opinion, not only generally, but specifically as to whether he "has heard" that the defendant was arrested for a criminal act inconsistent with the good reputation previously testified to on direct. *See United States* v. *Silverman*, 430 F.2d 106, 125-126 (2d Cir.), *cert. denied*, 402 U.S. 953 (1970); McCormick *Evidence*, (2d ed. 1972) § 191 [3A Wigmore, Evidence (Chadbourn rev.) § 988]. In this case defendant's witness testified that Bermudez' reputation in the community was that of a law abiding citizen (1166), it was then proper to question the basis of that testimony by asking the witness if he had heard that the defendant had been arrested in New Orleans on a marijuana charge. Appellant here has failed to make any "clear showing" that the district court's ruling constituted a "prejudicial abuse of discretion." *United States* v. *Michelson*, 335 U.S. at 480.

Appellant's related argument that the district court's cautionary instruction was inadequate is likewise without merit. The instruction was clear and raised no implication that Bermudez had actually been arrested. At the time the question was asked, Chief Judge Mishler instructed the jury (1198):

> Now, the only reason I permitted that question is because this witness is [sic] offered to testify as to the opinion of a community concerning the defendant and traits of character that relate to honesty, integrity, and the defendant as a law abiding citizen. And that opinion is usually a sum total of everything that happened to a man throughout his life, whether it was false or not. And so I allowed that question to be asked for that reason. ***But it is not***

> *offered for the truth of it.* That's unimportant to the testimony of the witness. So use it for that limited purpose. [Emphasis added] (1198).

Moreover, in his charge to the jury at the end of the case Chief Judge Mishler was even more specific (Appellant Diaz-Martinez's Appendix at 607):

> The two witnesses who came as character witnesses said no. Well, that was offered for a very specific purpose, first to see what the witnesses knew about Bermudez' general reputation, and if the witnesses had answered in the affirmative, to determine whether it affected his character. If the witness said no, you may not assume in any way that he was arrested, there is no proof in the record that he was.

This charge was adequate and hardly constitutes reversible error.

POINT VI

The introduction of circumstantial evidence against appellant Vivas to show his participation in the conspiracy was proper.

Six weeks after the expiration of the conspiracy charged in count one of the indictment, DEA Agents executed a search warrant on the home of appellant Vivas (994). As a result of that search, various implements of an active cocaine business as well as traces of cocaine were found. Chief Judge Mishler properly admitted this evidence (solely against appellant Vivas) because, if credited by the jury, it constituted circumstantial evidence of Vivas participation in the conspiracy to deal in cocaine. Moreover, he specifically charged the jury that (Appellant Diaz-Martinez's Appendix at 615):

> Now, I charge you that as a matter of law it was after the Conspiracy terminated, and is not chargeable in any way against the defendant Bermudez, or Diaz-Martinez. And it's offered for a very limited purpose against the defendant Vivas. You are not to be concerned as to whether the equipment, the substance was evidence of another crime. The only purpose it's offered, if you find it credible, and you find it relevant to the issue, is to determine whether it is some proof that the defendant Vivas entered into the Conspiracy charged in this indictment, and for no other reason.

The evidence was plainly admissible for this limited purpose and the district court's determination that its probative value outweighed any improper prejudicial effect was not an abuse of discretion. See *United States* v. *Torres* — F.2d — (2d Cir., decided July 2, 1975). *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, — U.S. — 43 USLW 3584 (April 28, 1975).

POINT VII

The ruling by the trial court that Special Agent Abbott was qualified to express an opinion as an expert on the identity of cocaine, after he testified that he had been trained to make such identifications, was proper.

Although appellants Bermudez and Vivas cite no case to support their proposition, they claim that prejudicial error was committed when Drug Enforcement Administration Agent Abbott was permitted to testify, that in his opinion, a white powdery substance shown to him on November 29, 1973, was cocaine. Agent Abbott did not purchase the cocaine on that occasion because he did not have sufficient funds to pay for what was represented by

appellants to be one-half kilo of cocaine (see, *supra*, p 5). This claim is without substance. A district court judge has wide discretion in determining the qualifications and competency of a witness to express an opinion as an expert: and further, it is settled that his decision will not be disturbed unless there is a clear showing of abuse of discretion. See *Tropea* v. *Shell Oil Company*, 307 F.2d 757, 763 (2d Cir. 1962); Fed. R. Evid. Rule 702 (Advisory Committee Note).

While direct chemical analysis of the white powdery substance is the best basis for an expert identification of cocaine, it is certainly not the only basis. During the voir dire of Agent Abbott, his knowledge and experience in drug identification was clearly established. Agent Abbott testified that while at BNDD basic training school, he had been specially trained to make visual identifications of different drugs, including cocaine (193). Also, that during his four years of experience as an agent for the Drug Enforcement Administration he had on nearly 25 occasions identified cocaine solely upon observation, and that each identification has been confirmed by chemical analysis (193-194). Further, on direct examination, Agent Abbott gave a detailed explanation of how cocaine may be visually identified and chemically analyzed (193, 204-210).

Moreover, since Agent Abbott made the identification during his transactions with one of the appellants for the sale of a quantity of cocaine, the very nature of a narcotics transaction supports his qualification as an expert in this area. As with any clandestine sale, it is not always possible for the purchaser to make a chemical analysis prior to the sale. Often the buyer must depend upon the seller's warranty and upon his own ability to make a visual and sometimes taste identification of the substance before making payment. Certainly Agent Abbott as a seasoned undercover agent was fully aware of this and prepared to make that type of identification.

Since there was sufficient basis for Agent Abbott's testimony to be admitted, whatever infirmity existed in his testimony as a result of a chemist's testimony that cocaine cannot be identified by observation went to the weight of Abbott's testimony and not, as appellant contends, its admissibility.[22] *Cf. United States* v. *Clark*, 498 F.2d 535, 536-537 (2d Cir. 1974). Moreover, the trial court properly instructed and charged that the Agent's testimony was not binding and that the jury was the ultimate judge of the testimony's value (210-211, 1728-1730).

POINT VIII

The midtrial instructions on conspiracy were proper and fair.

The United States offered the testimony of Agent Abbott as to the acts and declarations of co-conspirator Blanco (213). Appellants' counsel objected, thereby requiring the trial court to rule on its admissibility and to explain the circumstances under which the testimony was to be tentatively received (213-216). When appellants' counsel persisted in objections to the district court judge's first explanation (216-219), Chief Judge Mishler decided to allay all doubts by repeating the explanation "word for word from the charge book" (218). Whereupon the jury was instructed to disregard the previous instructions, and a second set of instructions was read (219-224).[23]

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[22] In fact Agent Abbott did more than merely observe a white powdery substance. He sifted through it with a spoon (342); he took a small bit of it and rubbed a bit of it in his hand after which it became numb (344).

[23] The first set of instructions (216-219) so closely paralleled the second set (219-224) which were read verbatim from the charge book; *1 E. J. DeVitt and C. B. Blackman, Federal Jury Practice and Instructions*, §§ 23.09, 29.05, 29.06 (2d Ed. 1970), that the two are substantively indistinguishable.

Appellants Bermudez and Vivas' broadest challenge is their assertion that the giving of a conspiracy charge was improper because "unrelated at that time to the trial evidence" (Appellant Bermudez's brief at 30). Appellants further contend that both charges were confusing to the jury because given in "general terms" (Appellant Bermudez's brief, at 30-31). These claims are without merit.

The prevailing practice in conspiracy cases is for the district court to instruct the jury after first determining, beyond a reasonable doubt and by *evidence aliunde*, that the defendant participated in the conspiracy. Chief Judge Mishler instructed the jury in accordance with this practice in each of his midtrial charges (216 and 222) and before excusing the jury for deliberation (1743). Such instructions are particularly important when defense counsel interposes an objection (213).[24]

This requirement of appropriate instructions upon admission of hearsay testimony subject to connection is not modified by the series of cases holding that once the judge has already made an initial determination that a fair preponderance of the independent evidence shows that the defendant participated in the conspiracy, then no instruction is required as the jury may consider all evidence to determine whether the defendant's participation is proved beyond a reasonable doubt. *United States* v. *Projansky*, 465 F.2d 123, 137-38 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *accord*, *United States* v. *Jacobs*, 431 F.2d 754, 760-61 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971), *United States*

[24] It is error for the court to fail to instruct the jury as to the basis for admissibility and the predicate showing of conspiracy required. *United States* v. *Pennett*, 496 F.2d 293, 296 (10th Cir. 1974); *United States* v. *Cohen*, 489 F.2d 945, 950 (2d Cir. 1973); *cf. Lutwak* v. *United States*, 344 U.S. 604, 619 (1953); *United States* v. *Pordum*, 451 F.2d 1015, 1017 (2d Cir. 1971), *cert. denied*, 405 U.S. 998 (1972).

v. *Nuccio*, 373 F.2d 168, 173 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967). In the present case the testimony in question was offered in the trial when it was not possible for the trial judge to make an initial determination of admissibility.

Chief Judge Mishler instructed the jury in accordance with the prevailing rule that it is their function as fact-finders to determine beyond a reasonable doubt solely by evidence of the defendant's own actions[25] and statements whether he was a member of the conspiracy, and that only following a determination that he was, could they charge the defendant with the acts and declarations of a co-conspirator. Appellants have no valid objection to this charge which was more favorable to them than the alternative also permissible in this Circuit. *See, e.g., United States* v. *Jacobs, supra*, 431 F.2d at 761.

Appellants also advance the following specific allegations of prejudice: (1) that the first instruction failed to advise the jury that the essence of the conspiracy charges before them was agreement to violate 21, U.S.C. § 841(a); (2) that the district court, through an analogy in the course of the first charge, erroneously instructed the jury that one is liable for the act of a co-conspirator in furtherance of the conspiracy even if one has no knowledge of the act, or in fact opposes it; (3) that the part of the second charge, which postulated that proof of a conspiracy requires evidence that one or more of the means or methods set forth in the indictment was first agreed upon and then actually used to carry out the alleged conspiracy, was objectionable

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[25] To the extent that this charge lumped acts with declarations, it was favorable to the defense. *United States* v. *Franzese*, 392 F.2d 954, 964 n.14 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969). *See Lutwak* v. *United States*, 344 U.S. 604 617-19 (1953); *United States* v. *Costello*, 352 F.2d 848, 853-54 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 201 (1968).

in that the indictment did not charge any overt act, or agreed upon means or method; and (4) that the part of the second charge relative to the admissibility of statements made out of the presence of defendant "presupposed and was premised upon the existence of a conspiracy and . . . defendant's participation therein" (Appellants' Brief at 31).[26] All of these contentions are without merit.

These allegations of prejudice are not supported by the record in the case and of the law of conspiracy:

(1) The first charge did not fail to inform the jury that the essence of the conspiracy charge before them was agreement to violate 21, U.S.C. § 841(a) (214-15). This charge employed the word "partnership" and not the word "agreement". Error cannot be found in the absence of what Chief Judge Mishler characterized as "magic words" (217-18), but in any event the second charge did include the word "agreement" (220).

(2) The instruction that one is liable for the act of a co-conspirator even if one has no knowledge of the act, or in fact opposes it, was a correct statement of the law. *See, Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946). *Cf. United States* v. *Sperling*, 506 F.2d 1323, 1341-42 (2d Cir. 1974), *cert. denied*, 95 S.Ct. 1351 (1975).

(3) The second charge made reference to means or methods "set forth in the indictment" and agreed upon to carry out the alleged conspiracy. This reference to the indictment, which in fact did not set forth such means or methods, was merely "a bit of boiler plate in a long charge"; *United States* v. *Smith*, 343 F.2d 607, 609 (2d Cir. 1965), and was not prejudicial.

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[26] No objection to the second set of instructions having been raised at trial, appellants' third and fourth allegations are untimely. F.R. Crim Rule 30. Appellants' contention that "no opportunity to make objections was allowed by the trial court" (Appellants' Brief at 31) is not supported by the record (224).

(4) Each midtrial charge was in three parts; proof of the existence of a conspiracy; proof of membership in the conspiracy; and treatment of testimony as to acts and declarations of co-conspirators. The tripartite charges were expressly designed to make clear that consideration of a co-conspirator's declarations made out of the presence of the defendant must be "premised upon the existence of a conspiracy and . . . defendant's participation therein" (Appellant Bermudez's Brief at 31).

POINT IX

The trial court neither cut short the deliberations of the jury, nor coerced a verdict.

Appellants' allegation that the trial court "cut short the deliberations of the jury and coerced a verdict" is peppered with unsupportive statements quoted out of context from the trial transcript (Appellant Bermudez's Brief at 32-38). The contention has no basis in the record and does not require lengthy refutation.

After a full day of deliberations the jury informed the district court that it was unable to reach a decision (1777). Contrary to appellants' suggestion, the jury had not yet been questioned as to the progress of their deliberations; on its own initiative the jury sent out a note that it was deadlocked. Chief Judge Mishler asked for suggestions of counsel. Counsel for defendant Vivas suggested that the jury deliberate some more. Chief Judge Mishler made this suggestion to the jury (1777-1779). Appellant asserts that this limited encouragement to the jury to continue its efforts to reach a verdict was coercive (Appellant Bermudez's brief at 34-37).

The supplemental charge was merely the minimal explanation necessary to avoid the jury receiving an impres-

sion that it was being ordered to continue deliberations. Certainly no language in the charge urged a speedy verdict. Indeed, it could not even be classified as a modified *Allen* [27] charge. It did not single out the minority and direct that they re-examine their thinking, or suggest that jurors should listen to each other with a disposition to be convinced. Chief Judge Mishler directed the jury in the most general terms possible: "I think it is important that you make an effort to come to a verdict, if you can . . ." (1778). In any event, the use of the *Allen*-type charge has been repeatedly upheld in this circuit. *See, e.g., United States* v. *Lee,* 509 F.2d 645, 646 (2d Cir. 1975); *United States* v. *Martinez,* 446 F.2d 118 (2d Cir.), *cert. denied,* 404 U.S. 944 (1971); *United States* v. *Hynes,* 424 F.2d 754 (2d Cir.), *cert. denied,* 399 U.S. 933 (1970).

The instructions suggested that if the jury failed to reach a verdict the lawyers would have to do their work all over again, and that "there is no reason to suppose that any other jury is going to be of better quality and decide it differently than you" (1778). Such specific reference to the desirability of avoiding a retrial is considered proper in a supplemental charge. *United States* v. *Tyers,* 487 F.2d 828 (2d Cir. 1973), *cert. denied,* 416 U.S. 971 (1974); *United States* v. *Jennings,* 471 F.2d 1310, 1313-14 (2d Cir.), *cert. denied,* 411 U.S. 935 (1973).

Appellant also objects to that part of the supplemental conspiracy charge explaining that "if the Government proved all the four elements essential to this crime beyond a reasonable doubt then you must find the accused guilty. If you find they have not proved all those four elements then find them not guilty" (1797). An explanation of the burden of proof in this manner is assuredly not prejudicial.[28]

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[27] *Allen* v. *United States,* 164 U.S. 492 (1896).

[28] Finally, appellant claims that the trial court, during instructions on conspiracy subsequent to the supplementary charge

[Footnote continued on following page]

POINT X

The Government was under no obligation to produce Victor Blanco as a witness.

Appellants Bermudez and Vivas also argue that the United States was allegedly obligated to produce Victor Blanco as a witness, and its failure to do so prevented vital *Brady* material from being presented to the jury. This claim is without merit. The Assistant United States Attorney in charge of the prosecution, during a side-bar after Manuel Fiffe's direct examination, advised the court and counsel, according to *Brady* v. *Maryland*, 373 U.S. 83 (1963), that Fiffe's testimony was inconsistent with co-conspirator Blanco's present account of the events (733). During Fiffe's cross-examination by Bermudez' counsel, the Assistant also informed the district court and counsel that the United States would not call Blanco as a witness (844). At that point, or at any other time, the defense could have asked that Victor Blanco, who was and is in jail, be produced. Appellants did neither. Alternatively, counsel for Bermudez could have cross-examined Manuel Fiffe on this newly revealed information, but chose not to.

[Footnote continued from prior page]
discussed *supra*, showed a plain impatience with the jury by his statements that "there is nothing mysterious about [the conspiracy charge]" (1796), and that "I hope I got [the definition of conspiracy] across" (1797). Such statements either in or out of context, do not evidence impatience.

POINT XI

Appellants' Bermudez and Vivas remaining arguments are frivolous.

A. There was sufficient evidence to indict appellants Bermudez and Vivas for conspiracy.[29]

Appellants' claim that there was no evidence presented before the grand jury as to their participation in the conspiracy charged in count one in the indictment. This contention is simply absurd. As appellants well know and perhaps have forgotten, Special Agent Abbott testified before the grand jury on May 30, 1974 (173). His testimony there paralleled his testimony at trial as to the November 20, 1973 meeting in the Vivas record store with appellants Bermudez and Vivas (290-346, see, also, *supra*, p. 5).[30] This testimony provided more than sufficient evidence that appellants Bermudez and Vivas entered the conspiracy as early as November 20, 1973.

B. There was sufficient evidence at trial to support the conviction of appellant Bermudez.[31]

Appellant Bermudez raises a melange of essentially meritless contentions in support of his contention that no "legal evidence existed to support appellants' conviction for conspiracy". Each of the charged errors are essentially a needless repetition of arguments raised elsewhere in appellants brief and to which we have already responded. (1)

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[29] This argument is in response to Point II of appellants' brief.

[30] Manuel Fiffe's testimony at trial concerning the participation of Bermudez and Vivas merely corroborated Agent Abbott's testimony.

[31] This argument is response to appellant Bermudez Brief Point III.

As to the issue of improper leading questions *see* Point XI —*infra*. (2) As to the failure to produce Victor Blanco *see* Point X *supra* (3) As to Agent Abbott's testimony about being able to identify cocaine by observation *see* Point VII *supra*.

C. The testimony objected to in Point IV of Appellant Bermudez's brief was properly admitted.

Appellant cites two examples of "improper prejudicial" testimony. First, appellant Bermudez asserts that Fiffe's testimony that he had "sniffed cocaine with both appellant Bermudez alone and in the company of appellant Diaz-Martinez was of no probative value and was unduly prejudicial. It may be simply noted that appellant failed to object to this testimony at the trial (711). The law on this point is firm. Unless appellant can now demonstrate "plain error", his failure to make a sufficient contemporaneous objection during the trial on this evidentiary matter precludes its further review. *United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974). No error exists in the admission of this testimony in any event. Fiffe's statements that he, Diaz, and Bermudez sniffed cocaine in the clothing store is highly probative in explaining the background of the conspiracy. The testimony can not be deemed admitted therefore simply to show appellants' bad character. *See United States* v. *Torres* — F.2d — (2d Cir., slip opinion decided July 2, 1975.)

Second, appellant also claims error in the testimony of Agent Abbott that appellant Bermudez had offered to sell him 300-500 pounds of marijuana during the November 20, 1973 meeting at the record store (304). Although, no objection was made by any of the defense counsel, Chief Judge Mishler excused the jury in order to question the need for any further development of this line of testimony (304). During an extended side-bar discussion (304-331),

counsel for appellants finally moved to strike the testimony and demanded a mistrial. The district court denied the motion but immediately instructed the jury to disregard the testimony as irrelevant (335). The instruction was sufficient to cure any alleged error. *Frazier* v. *Cupp*, 394 U.S. 731, 735 (1969); *Spencer* v. *Texas*, 385 U.S. 554, 565 (1966).

D. The hearsay objections raised in Point VI of Appellant Bermudez's brief are without merit.

Appellant Bermudez cites two examples of hearsay testimony that were improperly admitted. Appellant first claims a conversation between Victor Blanco and Special Agent Abbott was inadmissable hearsay. This claim of error is yet another example of an objection being raised by appellant Bermudez for the first time on appeal. No objection was ever made at the trial in the testimony of co-defendant Victor Blanco concerning the events in the record store on November 20, 1973 (302). Moreover, appellants' claim blatantly ignores the co-conspirator exception to the hearsay rule. *United States* v. *Geany*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 387 U.S. 1028 (1970). *See* Point VIII *supra*.

Appellants second contention relates to the testimony of Fiffe that, upon his calling Bermudez at home on November 20, 1973 he was informed by an unknown woman that Bermudez was at Vivas' Record Store (723-727). The district court admitted this testimony subject to connection (724). After further testimony which indicated that Bermudez was, in fact, at the record store as planned, the district court admitted the testimony. Chief Judge Mishler ruled that the unknown individual who had answered the phone at Bermudez's house appeared to be acting with appellants' Bermudez' knowledge and consent (727). In any event, since Fiffe, and Abbott testified that they saw Bermudez at the record store, shortly after the telephone conversation, any error in admitting the testimony regarding the conversation was harmless.

E. The creditability of Special Agent Abbott and Manuel Fiffe was properly determined by the jury.

In Points VII, XI and XII, appellant Bermudez asserts that the testimony of both Special Agent Barry Abbott and Manuel Fiffe was perjurious, and "incredible as a matter of law".

Both Abbott and Fiffe were extensively cross-examined by the three defense counsel, and their testimony was corroborated in many respects by the several other witnesses presented by the United States. The credibility of their testimony was solely for the jury, *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966).

F. No error was committed by the trial court's refusal to allow continued examination of one of the chemists.

In Point IX of his brief, appellant Bermudez asserts that the district court improperly sustained objections of the Assistant United States Attorney during the cross-examination of one of the Drug Enforcement Administration chemists. A cursory examination of this testimony (1094) reveals that in response to counsel's question, the witness said in effect that he could not identify a substance as cocaine merely by looking at it. An objection to the next question ("It is simply not possible, is it?" (1094)) was sustained. This question was merely a repetition of the preceding one and therefore any error in sustaining it was harmless.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: August 25, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

STEVEN KIMELMAN,
Assistant United States Attorney,
Of Counsel.[32]

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[32] The United States Attorney's Office wishes to acknowledge the assistance of Laura A. Brevetti, and Morton J. Marshack in the preparation of this brief. Ms. Brevetti is a third year law student at Georgetown Law Center and Mr. Marshack in a third year law student at Hofstra Law School.

APPENDIX

Affidavit for Search Warrant

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

Magistrate's Docket No. 74M

Case No. 449

UNITED STATES OF AMERICA

—VS.—

PREMISES KNOWN AS 293 CLOTHING CORPORATION, 293 GRAND STREET, BROOKLYN, NEW YORK.

Before: ....
Name of Magistrate Address of Magistrate

The undersigned being duly sworn deposes and says:

That he (has reason to believe)[1] that (on the premises known as) 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York, in the Eastern District of New York there is now being concealed certain property, namely a substantial quantity of marijuana, a Schedule I controlled substance and cocaine, a Schedule II narcotic drug controlled which are being possessed with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1).

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

RIDER

MICHAEL J. CAMPBELL, being duly sworn, deposes and says that he is a Special Agent of the Drug Enforcement Administration, duly appointed according to law and acting as such.

(1) On March 25, 1974, a previously reliable informant, who has provided information which has been corroborated on at least seven prior occasions during the past five weeks, stated to your deponent that a large quantity of marijuana and cocaine is presently secreted in the basement at 293 Grand Street, Brooklyn, New York. The previously reliable informant further stated that an individual named Diaz is associated with the Premises Known As 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York, and that Diaz deals in both marijuana and cocaine. In addition, the informant stated that within the past five days a very close personal friend and acquaintance had purchased in excess of one pound of marijuana for Three Hundred and Fifty Dollars ($350.00) a pound in the basement of 293 Grand Street, Brooklyn, New York from an individual named Diaz. The informant had stated that the acquaintance had shown him the marijuana purchased and that it was shaped in a circular brick form and further that the acquaintance had told him that there was in excess of Five Hundred (500) pounds of marijuana and a quantity of cocaine in the basement of 293 Grand Street, Brooklyn, New York. From his own personal knowledge and from information given by the acquaintance, the informant gave the following description of the Premises Known As 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York: that to enter the store, one had to go through a glass

doorway and that there are glass windows on either side of the doorway in front of the store; once inside the store, the front area has clothing hanging on racks, both on the wall and floor and at the rear of that area is a room which is partially partitioned; that upon entering this second area and turning to the left, one would pass over a trap door leading to the basement prior to reaching a bathroom, and that in order to enter the basement, which is not well lighted, a ladder is used. The previously reliable informant stated that the acquaintance had given him the following telephone numbers for Diaz, the individual from whom the marijuana was purchased: (212) 782-4307 and (212) 387-7180. The previously reliable informant further stated to your deponent that he has purchased quantities of cocaine from Diaz at 293 Grand Street, Brooklyn, New York, on a number of occasions within the past three years.

(2) On March 25, 1974, your deponent contacted the New York Telephone Company for a telephone check on (212) 782-4307 and (212) 387-7180 and was advised that the former telephone number is subscribed to by the Premises Known As 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York and the latter telephone number is subscribed to by J. Diaz, 239 South 4th Street, Brooklyn, New York. On March 26, 1974, your deponent checked the Drug Enforcement Administration files which revealed an open investigation into cocaine trafficking by several individuals connected with the Premises Known As 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York, including Juan Diaz, 239 South 4th Street, Brooklyn, New York.

(3) On March 26, 1974, Special Agent Abbott of the Drug Enforcement Administration stated to your deponent that in November 1973, he had purchased approximately four ounces of cocaine in the basement of the Premises

Known As 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York and that an individual named Diaz was in the clothing store at the time of said transaction. Special Agent Abbott gave your deponent a description of the Premises Known As 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York, including the basement area which corresponded to the description given to your deponent by the previously reliable informant.

MICHAEL J. CAMPBELL
Special Agent

Sworn to before me this
26th day of March 1974

VINCENT A. CATOGGIO
United States Magistrate

Search Warrant

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—v.—

PREMISES KNOWN AS 293 CLOTHING CORPORATION, 293 GRAND STREET, BROOKLYN, NEW YORK.

To Any Special Agent, Drug Enforcement Administration.

Affidavit having been made before me by Michael J. Campbell that he (has reason to believe)[1] that on the premises known as 293 Clothing Corporation, 293 Grand Street, Brooklyn, New York in the Eastern District of New York there is now being concealed certain property, namely a substantial quantity of marijuana, a Schedule I controlled substance and cocaine, a Schedule II narcotic drug controlled substance which are being possessed with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1) and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

Search Warrant

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 26th day of March, 1974

VINCENT A. CATOGGIO
U. S. Magistrate

Search Warrant

RETURN

I received the attached search warrant March 26, 1974, and have executed it as follows:

On March 27, 1974 at 11:30 o'clock A.M., I searched the premises described in the warrant and I left a copy of the warrant with Manuel Fiffe, store employee together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1—An (1) amber glass bottle, 16 oz. labeled lactose, hydrons, U.S.P.

2—A(1)clear plastic bottle, containing white powder approximately 10 oz.

3—One plastic spoon.

4—One roll plastic baggies.

5—One strainer containing suspected residue.

6—One brown paper bag with writing & numbers.

This inventory was made in the presence of Special Agent Edward Magno and Manuel Fiffe.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

MICHAEL J. CAMPBELL

Subscribed and sworn to and returned before me this day of , 19 .

Asst. U.S. Attorney
David DePetris
3/27/45
596—3322

This Mr. Michael J. Cambell has been push out of the store for the same reason on March 26th, 1974 by owner of store for using the basement without permission.

Notice of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Index No. 74 Cr. 403

UNITED STATES OF AMERICA

—against—

ISRAEL DIAZ-MARTINEZ,

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed duly verified affidavit of Stephen R. Mahler, Esq., portions of a certain New York State Supreme Court trial transcript, and on all the papers and proceedings heretofore had herein, the undersigned will move this Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, in a part thereof to be presided over by Honorable Jacob Mishler, to be held in the United States Courthouse located at 225 Cadman Plaza East, Brooklyn, New York, on the 6th day of June, 1975, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order setting aside the judgment of this Court rendered herein on February 7, 1975, and granting a new trial on this indictment to defendant Israel Diaz-Martinez on the grounds of non-disclosure of evidence and newly discovered evidence, and in the interests of justice, and for such other and fur-

ther relief as to this Court may seem just and proper.

Dated: Forest Hills, New York
May 16, 1975

Yours, etc.,

ZUCKERBERG, SANTANGELO & MAHLER, P.C.
Attorneys for Defendant
Office & P.O. Address
118-21 Queens Boulevard
Forest Hills, New York 11375
(212) 268-5575

To:

HON. DAVID TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Affidavit of Stephen R. Mahler

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

—against—

ISRAEL DIAZ-MARTINEZ,

Defendant.

State of New York
County of Queens ss.:

STEPHEN R. MAHLER, being duly sworn, deposes and says:

That I was the attorney for defendant Israel Diaz-Martinez upon the trial of this cause and make this affidavit in support of the instant motion for a new trial as one fully familiar with the facts and circumstances herein.

That your affiant is also the attorney for Juana Guzman —a person named as an unindicted co-conspirator in this instant indictment—in connection with a New York State indictment presently awaiting trial in Kings County (Number 3202 of 1974), wherein she is a co-defendant of Manuel Fiffe.

That in preparation of this state trial, your affiant recently ordered and received the transcript of the entire testimony of the police witnesses who testified upon the trial of still another state indictment (Kings County Number 3201 of 1974), which named Manuel Fiffe and Victor Blanco as co-defendants. This transcript reveals that the government did not turn over to defense counsel, upon the

trial of 74 Cr. 403, crucial Brady and Jencks materials to which they were entitled and which might have had a vital bearing on the outcome of the case.

That placing the transcripts from the trials of federal indictment 74 Cr. 403 and state indictment 3201 of 1974 side by side, it becomes readily apparent that federal and state narcotic officers were conducting a joint investigation of narcotic activities roughly between October 25, 1973 and June 21, 1974, and centering around the clothing store at 293 Grand Street in Kings County.

That the government prosecutors, except when it suited their purposes, refused to acknowledge the state part of the venture which would have entailed much Brady and Jencks materials that they would have been required to turn over under the federal rules.

That the government did, as the court will recall, formally acknowledge the state participation when it saw fit to call state detective Saul Rodriguez to the witness stand as a severely damaging rebuttal witness to defendant Diaz-Martinez. The court will also recall that prior to cross-examining this witness, your affirmant demanded all the written reports (usually referred to as D.D. 5s) which detective Rodriguez filed in connection with his investigation termed "operation 560". He produced but one page and insisted that that was all there was to it. The transcript of his state testimony belies this and indicates that operation 560 entailed an extensive investigation involving some of the very same people and locations during the same period of time as were concerned in the case then on trial, and encompassed several reports (see, for instance, page 180 of the state transcript).

That perhaps most importantly, the failure to yield these discovery materials enabled Manuel Fiffe, as a star

government witness, to consistently paint himself as a mere runner or errand boy for defendant Diaz-Martinez, while defense counsel vainly tried to reveal him as a completely independent operator along with the other government witness Luis Miranda. The impact of his testimony in this regard was of even greater significance when it is remembered that none of the government agents ever testified to actually observing any illegal activities on the part of Diaz-Martinez. Apart from the testimony of Fiffe, Miranda and Rodriguez, the case against Diaz-Martinez was all suspicion and surmise.

That the state trial transcript discloses that the police, during virtually the same time sequence as was involved in this federal case, observed, met and did cocaine business solely with Fiffe and Blanco, even to the point of first meeting with Blanco at 97 Clinton Avenue (the federal agents claim to have done this on slightly different days within the next two or three weeks) on November 15, 1973 and then going on to meet Fiffe at the clothing store at 293 Grand Street, where they went down to the basement (without mentioning the name of Diaz-Martinez once) through a trap door and bought a quarter of a kilo of cocaine for $6,000 (transcript pages 120 through 126). Nowhere in the transcript of police testimony does the name of Israel Diaz-Martinez appear nor is there any testimony as to someone fitting his description being involved in any way throughout their investigation. On the contrary, Fiffe and Blanco are made out to be the sole operators.

That had the state police reports concerning their operation 560 been made available to defense counsel at the time of the federal trial as Jencks or Brady material, the defense would surely have been able to disprove the "errand boy theory" advanced so successfully by the government through witnesses Fiffe and Miranda to the detriment

of defendant Diaz-Martinez. This may very well have changed the jury verdict of guilty which was not arrived at easily, but rather only after two (2) whole days' deliberation and three (3) or four (4) charges, since that verdict as to Diaz-Martinez had to be based solely on the testimony of Fiffe, Miranda and Rodriguez.

That not only does this state material contradict the government's case as mentioned hereinabove, but it also strengthens the contentions of Diaz-Martinez made on the witness stand, that he was often out of his store and could not be responsible for what his employees did in his absences.

That, in addition, Mr. Fiffe is charged, all by himself, in a Kings County indictment numbered 5571 of 1974, with possession and sale of cocaine, which the government, through their state counterparts, should have been aware of. Again, his testimony naming Diaz-Martinez as his boss, is contradicted.

That in regard to his state trial indictment, wherein he is a co-defendant of Ms. Guzman (referred to hereinabove as Kings County indictment #3202 of 1974), Mr. Fiffe is charged with the possession and sale of cocaine in Ms. Guzman's apartment at 239 South Fourth Street in Brooklyn. Had this information been availabe to the defense upon the trial of 74 Cr. 403, it would have been used to cross-examine him on that portion of his testimony in which he states that he cut cocaine in this particular apartment only for and in conjunction with Mr. Diaz-Martinez. Without this phase of Fiffe's testimony and agent Rodriguez's testimony, it is hardly conceivable that the jury would have convicted Diaz-Martinez, for there was virtually nothing else in the government case incriminating to this defendant.

Affidavit of Stephen R. Mahler

That this case is scheduled for argument before the Second Circuit on June 11, 1975.

That no previous application for the relief requested herein has been made.

WHEREFORE, it is respectfully requested that an Order be entered setting aside the judgment of this Court rendered herein on February 7, 1975, and granting this defendant a new trial, and such other, further and different relief as this court deems just and proper.

STEPHEN A. MAHLER

Sworn to before me this
16th day of May, 1975.
MARVIN ZUCKERBERG

Notary Public, State of New York
No. 30-9818075
Qualified in Nassau County
Commission Expires March 20, 1976

★ U. S. Government Printing Office 1975— 614—353—134

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 29th day of August 19 75 he served ~~a copy~~ two copies of the within Brief/for the Appellee and Appendix

by placing the same in a properly postpaid franked envelope addressed to: Thomas Matarazzo, Esq., 220 Court St., Brooklyn, N. Y. 11201; Charles Sutton, Esq., 299 Broadway, New York, N. Y. 10007; Zuckerberg, Santangelo & Mahler, P.C., 118-21 Queens Blvd., Forest Hills, N. Y. 11375.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
29th day of August 19 75

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977